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No. 92-662

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDAR COAL COMPANY, PETITIONER

v.

JEWELL SHUFF, SURVIVOR OF PAUL SHUFF, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether pneumoconiosis ("black lung disease") is a "substantially contributing cause or factor" leading to a miner's death, within the meaning of 20 C.F.R. 718.205(c)(2), when the disease hastens but is not the predominant cause of death.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-39a) is reported at 967 F.2d 977. The decision and order of the Benefits Review Board (Pet. App. 40a-45a) and the decision and order of the administrative law judge (Pet. App. 1a-33a) are not officially reported.

JURISDICTION

The court of appeals entered its judgment on June 18, 1992, and denied a petition for rehearing on July 16, 1992. Pet. App. 48a. The petition for a writ of certiorari was

iled on October 14, 1992. The jurisdiction of this Court i invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Black Lung Benefits Act, 30 U.S.C. 901 *t seq.*, benefits are payable to miners who are totally isabled by pneumoconiosis and to survivors of miners hose deaths were "due to" pneumoconiosis. 30 U.S.C. 01(a), 922(a), 932(c). The Secretary of Labor, who has uthority to administer the statute and issue appropriate egulations, 30 U.S.C. 902(c), 936(a), has provided that a eath is "due to" pneumoconiosis "[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death." 20 C.F.R. 718.205(c)(2). See lso 20 C.F.R. 718.205(c)(4) (survivors are not eligible for enefits where death is caused by a traumatic injury or a edical condition unrelated to pneumoconiosis, "unless * * pneumoconiosis was a substantially contributing ause of death"). The Director of the Office of Workers' ompensation Programs (OWCP), who administers the tatute on behalf of the Secretary, 20 C.F.R. 701.202(f), onsiders pneumoconiosis to be a "substantially contributing cause or factor" when it hastened a death that as predominantly caused by another condition.

2. In May 1983, Paul Shuff, a former miner, filed a laim for disability benefits against his former employer, etitioner Cedar Coal Co. Pet. App. 2a, 35a, 41a. Two onths later, before the claim was adjudicated, Mr. Shuff ied and, shortly thereafter, his widow, respondent Jewl Shuff, filed a claim for survivor's benefits. *Ibid.* After he claims were initially denied by a deputy commissioner in the Department of Labor's Office of Workers' ompensation Programs, Mrs. Shuff obtained a hearing efore an administrative law judge.

The ALJ found that Mr. Shuff had been totally disabled due to pneumoconiosis from April 1983, when he stopped work, until his death; accordingly, the ALJ awarded three months of benefits. Pet. App. 23a-25a, 30a-31a. Petitioner does not challenge the award of total disability benefits. See *id.* at 36a.

The ALJ also concluded, however, that the miner's death was not due to pneumoconiosis and accordingly denied Mrs. Shuff's claim for death benefits. With respect to the death benefits claim, the ALJ concluded that Mr. Shuff died from pancreatic cancer which had metastasized to other internal organs, although the immediate cause of death was pneumonia. Pet. App. 27a; see also *id.* at 9a. Thus, the "central question" for the ALJ was "whether pneumoconiosis was a substantially contributing cause of death because there is evidence that pneumoconiosis contributed to death insofar as it made the miner more susceptible to pneumonia, which was the immediate cause of death." *Id.* at 27a. The ALJ concluded that it was not such a cause. *Id.* at 29a. Although the ALJ recognized that pneumoconiosis may have "hastened" the miner's death by making him more susceptible to pneumonia, the ALJ did not make a definitive finding on this question, stating instead that cancer and cigarette smoking could also have increased Mr. Shuff's susceptibility and that the evidence linking pneumoconiosis and death was "somewhat extenuated." *Ibid.*

The Benefits Review Board affirmed. Pet. App. 40a-44a. It refused to apply the rule, adopted by the Director and affirmed in *Lukosevicz* v. *Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989), that a death hastened by pneumoconiosis is compensable under the Black Lung Benefits Act. Pet. App. 42a & n.3.

3. The court of appeals reversed. Pet. App. 34a-39a. Noting that the Director's interpretation was entitled to

substantial deference, the court agreed with the decision in *Lukosevicz*, for the reasons stated by the Third Circuit in that case, that the Director reasonably interpreted "substantially contributing cause or factor" to include a condition that hastens a miner's death. *Id.* at 37a-38a. The court rejected petitioner's argument that the Director's interpretation reads "substantial" out of the regulation. In the court's view, the Director's interpretation gives "substance to the regulation" and provides a workable definition of "substantial." *Id.* at 38a.

But the court found it unclear whether the ALJ actually determined that pneumoconiosis hastened Mr. Shuff's death. Pet. App. 39a. Because the ALJ's opinion was inconclusive and the medical evidence in conflict, the court remanded for a finding on that issue. *Ibid.*

ARGUMENT

As an initial matter, petitioner offers no persuasive reason for the Court to depart from its usual practice of declining to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967). Since the ALJ may find on remand that pneumoconiosis did not hasten Mr. Shuff's death, review is not warranted at this time. In any event, the court of appeals correctly upheld the Director's interpretation of the applicable regulation. And not only does the court's decision not conflict with any decision of this Court or any other court of appeals, the two other courts of appeals to consider the issue have reached the same result as the court below. *Peabody Coal Co.* v. *Director, OWCP*, 972 F.2d 178, 183 (7th Cir. 1992); *Lukosevicz*, 888 F.2d at 1004-1006. Accordingly, further review is not warranted.

1. Petitioner does not argue that the Director incorrectly interpreted the statute, which calls for the pay-

ment of benefits "[i]n the case of death of a miner due to pneumoconiosis," 30 U.S.C. 922(a)(2), by providing in 20 C.F.R. 718.205(c)(2) that benefits are payable "[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death." Rather, petitioner argues that the Director has misconstrued the regulation, particularly the phrase "substantially contributing cause or factor," by concluding that it includes cases where pneumoconiosis hastens death but is not the predominant cause of death. Pet. 16-18.

The Director's interpretation of the regulation is reasonable. The regulations do not define "substantial" and the term has a number of meanings. In some instances, it means "having substance; material" or "[n]ot imaginary; real." *Webster's II New Riverside University Dictionary* 1155 (1988). It may also mean "of considerable importance, value, degree, amount, or extent." *Ibid.* When pneumoconiosis "hastens" a death—speeds up or accelerates an event that is inevitable for everyone—it has a real and material effect on a person's lifespan. It therefore "substantially contributes" to a death, whether or not it is the predominant cause. See 2 Restatement (Second) of Torts § 431 comment a (1965) (using "substantial cause" to distinguish conduct producing an effect that would "lead reasonable men to regard it as a cause" from causes in the "philosophical sense," many of which produce such insignificant effects "that no ordinary mind would think of them as causes").

Petitioner does not dispute that "substantial" may mean "real" or "material." Instead, petitioner contends that cases construing a different statutory provision—the provision providing for benefits "[i]n the case of total disability of a miner due to pneumoconiosis," 30 U.S.C. 922(a)(1)—show that "substantially" should have a "more demanding" meaning. Pet. 18. But those disability cases

do not call into question the Director's conclusion that pneumoconiosis is a "substantially contributing cause or factor" leading to death when it hastens, but is not the predominant cause of, death. As an initial matter, there is no disability regulation analogous to 20 C.F.R. 718.205(c), the provision at issue here. Instead, some courts have themselves articulated a "substantially contributing" standard to determine whether a disability is "due to" pneumoconiosis. Those courts have construed "substantially" in a manner that is similar to the way the Director interprets it in 20 C.F.R. 718.205(c)(2). See *Bonessa* v. *United States Steel Corp.*, 884 F.2d 726, 728, 734 (3d Cir. 1989); *Lollar* v. *Alabama By-Prods. Corp.*, 893 F.2d 1258, 1265 (11th Cir. 1990). Other courts have rejected a "substantially contributing" standard for disability causation because they believed it *could* be construed the way petitioner proposes: to require an unspecified and difficult inquiry into the degree to which pneumoconiosis contributes to a disability. See *Robinson* v. *Pickands Mather & Co.*, 914 F.2d 35, 38-39 (4th Cir. 1990); *Hawkins* v. *Director, OWCP*, 907 F.2d 697, 705 (7th Cir. 1990); *Mangus* v. *Director, OWCP*, 882 F.2d 1527, 1531 (10th Cir. 1989). In short, none of those cases suggests that it would be appropriate to apply a "demanding" causality analysis in black lung cases.

2. Petitioner also argues that the Director's interpretation of the regulation is not entitled to deference because it "fails the test of consistency." Pet. 9-11. Specifically, petitioner argues that the Director's interpretation was first advanced more than five years after the regulation was promulgated and is inconsistent with other pronouncements of the Director. In fact, the Director advanced his interpretation in 1986, three years after the regulation was promulgated, in a brief to the Benefits Review Board in *Clark* v. *Director, OWCP*,

9 Black Lung Rep. (MB) 1-205 (1986), aff'd in part and rev'd in part, 838 F.2d 197 (6th Cir. 1988), and has consistently adhered to it.[1] Nor is it relevant that the Benefits Review Board rejected the Director's interpretation, because the Board is an adjudicatory tribunal, separate from the Director, see 33 U.S.C. 921(b); 20 C.F.R. 801.102(a)(6), whose views are entitled to no deference. See, *e.g.*, *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980); *Lukosevicz*, 888 F.2d at 1005-1006. In short, the Director's consistent interpretation of the Department's regulation is entitled to deference.

3. Petitioner also argues that the Director's interpretation does not "conform to the purpose of 20 C.F.R. § 718.205(c)." Pet. 11-16. To the contrary, the Director's interpretation fulfills the intent of the drafters of the 1981 amendments to the Black Lung Benefits Act. In those amendments, Congress eliminated a provision allowing the payment of death benefits whether or not a miner's death was due to pneumoconiosis, but Congress did not mandate a

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[1] In arguing that the Director has been inconsistent, petitioner cites positions the Director took in litigating when a *disability* is "due to pneumoconiosis." Pet. 9-10. Those positions are largely irrelevant to the dispute in this case. In any event, although the Director at one time argued that a disability was "due to" pneumoconiosis when pneumoconiosis was "in and of itself" disabling, the Director construed that standard to allow a claimant to obtain benefits by proving that pneumoconiosis, *as defined in 20 C.F.R. 718.201*, was "in and of itself" disabling. Because that definition of "pneumoconiosis" broadly includes any chronic pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," the Director's interpretation called for an award of benefits when any of a wide variety of impairments was totally disabling. See *Mangus*, 882 F.2d at 1530.

"demanding" inquiry into the extent to which pneumoconiosis contributed to the death. A fair interpretation of the comments of the congressional sponsors is that they thought that benefits should be awarded if pneumoconiosis was either *the* cause of death or a "substantially contributing factor." See 127 Cong. Rec. 31,747 (1981) (Rep. Perkins); *id.* at 31,978 (Sen. Hatch). They did not suggest that survivors should not receive benefits where pneumoconiosis hastened a death; rather, they intended survivors to be ineligible "where death was caused by a traumatic injury or an unrelated medical condition." *Id.* at 31,747 (Rep. Perkins); *id.* at 31,978 (Sen. Hatch). Consistent with those statements, the Department provided in 20 C.F.R. 718.205(c)(2) that death benefits would be payable if pneumoconiosis was "a substantially contributing cause or factor leading to the miner's death."[2]

The Department did not define "substantial," but it did emphasize that "pneumoconiosis need not [be] the 'principal', sole, primary or proximate cause of the miner's death in order for the survivor's claim to be compensable." 48 Fed. Reg. 24,277, para. n (1983). Construing "substantially contributing" cause to mean a

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[2] Petitioner notes that the "substantially contributing" standard was selected in place of a "significantly related to or aggravated by" standard, and argues that the Department therefore must have intended "substantially contributing" to be "demanding." Pet. 15-16. That does not follow. The Department eliminated the "significantly related to or aggravated by" standard largely because the Benefits Review Board, in a decision the Department thought was wrongly decided, had invalidated the Department's use of an "aggravation" standard. 48 Fed. Reg. 24.277 para. k (1983); *id.* at 24,276 para. g. It selected the "substantially contributing" standard because that was the phrase used by the congressional sponsors of the 1981 amendments.

"material or real" cause is consistent with the intent of the Department and Congress. See *Lukosevicz*, 888 F.2d at 1004-1006. Petitioner's alternative definition is inconsistent with Congress's intent, as understood by the Department when it promulgated the regulations applying the 1981 amendments, because petitioner seeks to resurrect the concepts of principal, primary, or proximate cause that the Department rejected. See *Robinson* v. *Pickands Mather & Co.*, 914 F.2d 35, 38-39 (4th Cir. 1990); *Compton* v. *Inland Steel Coal Co.*, 933 F.2d 477, 492 (7th Cir. 1991) (Coffey, J., concurring).[3]

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[3] Petitioner argues, Pet. 15-16, that the Department endorsed a "demanding" standard by eliminating a regulation allowing death benefits where death was due to multiple causes and it was "not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death." 20 C.F.R. 718.205(b)(2). But that regulation was repealed because it applied a presumption repealed by the 1981 amendments, see 30 U.S.C. 921(c)(2). The regulation was not repealed because the Department thought that the demanding standard petitioner seeks to apply is appropriate. See 48 Fed. Reg. 24,278 para. p (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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